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**IN THE
COURT OF APPEALS OF INDIANA**

HARLEY A. WELCH,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 43A03-0608-CV-343
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE KOSCIUSKO SUPERIOR COURT
The Honorable James C. Jarrett, Judge
Cause No. 43D02-0511-IF-5616

JUNE 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Harley A. Welch (“Welch”) appeals from his conviction after a bench trial, of the Class C infraction, failure to yield to an emergency vehicle.

We affirm.

ISSUES

Welch presents the following restated issues for our review:

1. Whether the trial judge abused his discretion by going to view the scene of the traffic violation after the close of evidence.
2. Whether the State met its burden of proving that Welch committed the Class C infraction, failure to yield to an emergency vehicle.

FACTS AND PROCEDURAL HISTORY

On November 20, 2005, Welch was issued a traffic citation for failure to yield to an emergency vehicle. The matter proceeded to a bench trial that was held on May 10, 2006. At the conclusion of the evidence, the trial judge asked the parties if they could agree about the location of the infraction. The trial judge stated that he wanted to view the scene. The parties could not agree on the location. The trial judge took the matter under advisement and reiterated his intention to view the scene.

The trial judge issued his written order on May 26, 2006, in which he found that the State had sufficiently proved by a preponderance of the evidence that Welch had failed to yield to an emergency vehicle. The trial judge entered a judgment against Welch in the amount of \$200.00 plus costs to be paid by June 26, 2006, or Welch could face a possible suspension of his driving privileges.

This appeal followed.

DISCUSSION AND DECISION

I. VIEW OF THE SCENE

Welch argues that the trial judge abused his discretion when he viewed the scene of the infraction. Welch contends that the trial judge obtained additional evidence upon which to base his decision while the attorneys were not present with him at the view.

The State maintains that Welch has waived this argument for review. When the trial judge announced at the close of evidence that he was going to view the scene, neither party objected to that action, or requested to be present at the scene with the judge. Failure to make a timely objection to a claimed error surrounding a view does not preserve the issue for our review. *See Simmons v. State*, 717 N.E.2d 635, 639 (Ind. Ct. App. 1999). By failing to object, Welch has waived this issue.

Nonetheless, Welch has failed to support his claim that the trial judge abused his discretion by improperly basing his decision on additional evidence allegedly obtained during the view of the scene of the infraction. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. *Datzek v. State*, 838 N.E.2d 1149, 1154 (Ind. Ct. App. 2005).

The trial judge has an inherent right to view the premises in controversy for the purpose of enabling him or her to more clearly understand the evidence at trial. *Berrey v. Jean*, 401 N.E.2d 102, 106 (Ind. Ct. App. 1980), disapproved on other grounds in *Fraley v. Minger*, 829 N.E.2d 476 (Ind. 2005). A trial judge may not base his or her judgment on information obtained by such extra-judicial inquiry that is not otherwise contained in

the record as evidence. *Id.* at 106-107. To do so would constitute reversible error. *Id.* at 107.

Furthermore, a court on review presumes the trial judge is aware of and knows the law, and considers only evidence properly before the judge in reaching a decision. *See Dumas v. State*, 803 N.E.2d 1113, 1121 (Ind. 2004). Here, the testimony presented supported both parties' arguments. We cannot assume that because the trial judge decided this matter in favor of the State, that the trial judge took in additional evidence at the scene. We will presume that the judge used the view to better understand the evidence and arguments of the parties before reaching his decision.

Further support of the propriety of the trial judge's decision is found in the order itself. Welch argues that the conclusion reached is erroneous because the trial judge referred to the view of the scene in his order. Welch claims that this indicates that the trial judge took evidence at the scene. However, the fact that the trial judge stated in his entry that he relied upon "the evidence and arguments submitted by the parties, and a viewing of the scene of the alleged violation" (Appellant's App. p. 65), demonstrates that the trial judge knew the difference between evidence, arguments of counsel, and a view of the scene and acted accordingly.

II. SUFFICIENCY OF THE EVIDENCE

Welch also argues that there is insufficient evidence in the record to support the trial judge's decision in favor of the State.

When reviewing a challenge to the sufficiency of the evidence, we will neither reweigh the evidence nor judge the credibility of witnesses. *See Slate v. State*, 798

N.E.2d 510, 520 (Ind. Ct. App. 2003). Rather, we look to the evidence that best supports the judgment and all reasonable inferences to be drawn therefrom. *Id.* If there is substantial evidence of probative value supporting the trial court's judgment, it will not be overturned. *Id.* We further observe that traffic infractions are civil, rather than criminal, in nature, and the State must prove the commission of the infraction by only a preponderance of the evidence. *Id.*

Ind. Code §9-21-8-35(b) states as follows:

Upon approaching a stationary authorized emergency vehicle, when the authorized emergency vehicle is giving a signal by displaying alternately flashing red, red and white, or red and blue lights, a person who drives an approaching vehicle shall:

(1) proceeding with due caution, yield the right-of-way by making a lane change into a lane not adjacent to that of the authorized emergency vehicle, if possible with due regard to safety and traffic conditions, if on a highway having at least four (4) lanes with not less than two (2) lanes proceeding in the same direction as the approaching vehicle; or

(2) proceeding with due caution, reduce the speed of the vehicle, maintaining a safe speed for road conditions, if changing lanes would be impossible or unsafe.

In the present case, the evidence in the record shows that Officer Bumbaugh's vehicle was stationary with the emergency lights flashing on the shoulder of U.S. 30, a highway having at least four lanes with not less than two lanes proceeding in the same direction as Welch's approaching truck. The parties agreed that the highway was dry and that there was a vehicle passing on Welch's left making it impossible initially for Welch to change lanes. However, the vehicle passed leaving the passing lane open for Welch. Officer Bumbaugh testified that after the vehicle passed Welch, Welch could have safely

proceeded into the passing lane, but failed to do so after Officer Bumbaugh shone his flashlight in Welch's direction. Officer Bumbaugh testified that Welch's truck passed him at very close range, at approximately thirty miles per hour causing the officer to be fearful.

While there is conflicting evidence in the record, including Welch's argument that he was attempting to obey both the statute regarding emergency vehicles and the posted signs requiring trucks to remain in the right-hand lane, we must not reweigh the evidence. As narrowly convincing as the evidence is that Welch violated the statute, the evidence is sufficient to sustain the trial judge's decision. Furthermore, there is no defense or exception to compliance with the statute. There was sufficient evidence to sustain the trial court's order finding that Welch violated the statute regarding failure to yield to an emergency vehicle.

Welch notes in his reply brief that the officer actually cited the penalty section of the statute regarding failure to yield to an emergency vehicle. This argument is made on appeal for the first time in Welch's reply brief. We do not address it here because an issue not raised in an appellant's brief may not be raised for the first time in a reply brief. *See Chupp v. State*, 830 N.E.2d 119, 126 (Ind. Ct. App. 2005).

The trial court did not err.

CONCLUSION

The trial judge did not abuse his discretion when he went to view the scene of the alleged traffic infraction. Further, there was sufficient evidence in the record to support

the trial judge's finding that Welch committed the traffic violation, failure to yield to an emergency vehicle.

Affirmed.

BAKER, J., and MAY, J., concur.